Supreme Court, U.S.
FILED
SEP 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-305

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

JEAN ANN CONE,

Petitioner,

vs.

THE FLORIDA BAR, FLORIDA BAR FOUNDATION, and HOLLAND & KNIGHT,

Respondents.

BRIEF OF AMICI CURIAE IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

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AMICI CURIAE

1. American Judicature Society
2. State Bar of Arizona
3. Arizona Bar Foundation
4. Arkansas Bar Association
5. State Bar of California
6. Legal Services Trust Fund of the State Bar of California
7. Colorado Bar Association
8. Colorado Lawyer Trust Account Foundation
9. Connecticut Bar Foundation
10. Delaware State Bar Association
11. District of Columbia Bar Foundation
12. State Bar of Georgia
13. Hawaii State Bar Association
14. Hawaii Bar Foundation
15. Idaho State Bar
16. Idaho Law Foundation
17. Lawyers Trust Fund of Illinois
18. Lawyer Trust Account Commission of the Supreme Court of Iowa
19. Kansas Bar Foundation

20. Louisiana State Bar Association

21. Maryland State Bar Association

22. Maryland Legal Services Corporation

23. Massachusetts Bar Association

24. State Bar of Michigan

25. Michigan State Bar Foundation, Inc.

26. Minnesota State Bar Association

27. Minnesota Lawyer Trust Account Board

28. Mississippi State Bar

29. Mississippi Bar Foundation

30. The Missouri Bar

31. Missouri Lawyer Trust Account Foundation

32. State Bar of Montana

33. National Association of IOLTA Programs, Inc.

34. National Interest on Lawyers' Trust Account Clearinghouse

35. National Legal Aid & Defender Association

36. Nebraska Lawyers Trust Account Foundation

37. State Bar of Nevada

38. Nevada Law Foundation

39. New Hampshire Bar Association

40. New Hampshire Bar Foundation

41. State Bar of New Mexico

42. New Mexico Bar Foundation

43. New York State Bar Association

44. Interest on Lawyer Account Fund of the State of New York

45. The North Carolina State Bar

46. North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts

47. Office of the Ohio Public Defender

48. Oklahoma Bar Foundation

49. Oregon State Bar

50. Oregon Law Foundation

51. Rhode Island Bar Foundation

52. South Carolina Bar

53. State Bar of South Dakota

54. Tennessee Bar Association

55. Tennessee Bar Foundation

56. State Bar of Texas

57. Texas Equal Access to Justice Foundation

58. Utah State Bar

59. Vermont Bar Association

60. Legal Foundation of Washington

61. The West Virginia State Bar

62. Central Florida Legal Services, Inc.

63. Florida Institutional Legal Services, Inc.

64. Florida Legal Services, Inc.

65. Legal Aid Society of the Orange County Bar Association, Inc.

66. Legal Aid Society of Palm Beach County, Inc.

67. Lutheran Ministries of Florida

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INTEREST OF AMICI CURIAE

Florida's interest on lawyers' trust accounts program, like the 45 similar programs throughout the country (herein collectively referred to as "Interest on Lawyers' Trust Account Programs," or

"IOLTA" programs) operates on the premise that nominal sums of money, or short term deposits, held by attorneys on behalf of their clients, constitute an unused economic resource which may be mobilized to generate income to improve the delivery of legal services to the poor. In short, IOLTA establishes a unique method of financing civil legal aid by harnessing assets that, before adoption of the program, were neither used nor capable of use.[1]

The sixty-seven Amici Curiae are all organizations vitally interested in the continued growth and success of IOLTA

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1. IOLTA's history and method of operation is explained in England & Carlisle, History of Interest on Trust Accounts Program, 56 Fla. B.J. 101 (1982). For a detailed explanation, and in depth analysis of the constitutional issues implicated by IOLTA, see Siegel, Interest on Lawyers' Trust Account Programs: Do They "Take" "Property" of the Client? 36 U. Fla. L. Rev. 674 (1984).

programs as a mechanism for bringing the concept of equal justice under the law a step closer to reality. The twenty-nine participating state bar associations have all been instrumental in creating IOLTA programs in their respective states. The twenty-eight participating IOLTA administering agencies all collect IOLTA generated funds and distribute them to providers of legal services to the poor, and for other worthy law-related public purposes.

Six amici appear as a representative sample of Florida IOLTA recipients. They all depend on IOLTA funds to provide legal services to the poor.

The American Judicature Society, the National Legal Aid & Defender Association and the National Association of IOLTA Programs, Inc., appear as amici because they represent a membership committed to

improving the justice system so that all may have an equal opportunity to vindicate their rights. The National IOLTA Clearinghouse provides technical assistance to states seeking to adopt and implement IOLTA programs.

Each participating Amici Curiae believes that IOLTA is critically important to ensuring that those in need of legal services do not go without. Their participation, and the participation of the Ford and Rockefeller Foundations in providing funds to assist in the preparation of this brief, all attest to the acceptance of the IOLTA concept by providers of legal services to the poor and a broadly representative sample of the legal profession throughout the country. Firmly believing that IOLTA programs are in the best tradition of the legal profession and not violative of the

fifth amendment, Amici Curiae fully support The Florida Bar's, Florida Bar Foundation's, and Holland & Knight's position that the Florida IOLTA program does not violate the Taking Clause of the fifth amendment to the United States Constitution.

REASONS FOR DENYING THE WRIT

ARGUMENT

IOLTA PROGRAMS, WHICH DO NOT INJURE CLIENTS EVEN TO THE EXTENT OF A PENNY, ARE FULLY CONSISTENT WITH SUPREME COURT TAKINGS JURISPRUDENCE.

A. IOLTA's Nationwide Acceptance.

Forty-five states and the District of Columbia have adopted IOLTA programs. The highest courts of seven states have published formal opinions adopting IOLTA programs; expressly holding that IOLTA does not violate the fifth amendment.

Matter of Interest on Trust Accounts, 402 So.2d 389 (Fla. 1981); Petition of Minnesota State Bar Association, 332 N.W.2d 151 (Minn. 1982); Petition of New Hampshire Bar Association, 122 N.H. 971, 453 A.2d 1258 (1982); Matter of Interest on Lawyers' Trust Acc., 672 P.2d 406 (Utah 1983); In the Matter of the Adoption of Amendments to CPR DR 9-102 IOLTA, 102 Wash.2d 1101 (1984); In the Matter of Interest on Lawyers' Trust Accounts, 283 Ark. 252, 675 S.W.2d 355 (1984), rev'g, 279 Ark. 84, 648 S.W.2d 480 (1983); Petition by Massachusetts Bar Ass'n, 395 Mass. 1, 478 N.E.2d 715 (1985).

In addition, thirty-three state supreme courts and the District of Columbia Court of Appeals have adopted IOLTA programs without formal opinion. IOLTA programs have been established by legislation in California, Connecticut, Mary-

land, New York and Ohio. The American Bar Association has endorsed the ethical propriety of IOLTA programs. A.B.A. Formal Opinion 348, 68 ABA J. 1502 (1982).

No court, in an adversary proceeding, has ever rejected an IOLTA program.[2] Two state supreme courts, without formal opinion, have refused to approve

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2. Three other challenges to IOLTA programs have been rejected. The California mandatory IOLTA program was upheld in Carroll v. State Bar of California, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305 (4 Dist. 1984), cert. denied sub nom. Chapman v. State Bar of California, ____ U.S. ____ (1985). In Ronwin v. Supreme Court of Iowa, (No. 84-1641), pet. for cert. denied, 471 U.S. 1101 (1985), this Court rejected an attempt to seek certiorari from the IOWA Supreme Court's rulemaking adoption of an IOLTA program. Terry v. Withrow, No. C85-1767 (N.D. Ohio filed June 21, 1985), filed by an attorney, was dismissed for lack of standing.

IOLTA programs.[3] IOLTA programs are currently under consideration in the remaining four states.

Two basic reasons account for the overwhelming acceptance of IOLTA. First, the legal profession fully recognizes the critical need for additional resources to improve the justice system. Second, there is no merit to the IOLTA opponents' taking claim.

This Court's multifactor balancing test [Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)], which examines taking claims by looking to the character of the governmental action and the economic impact of that action on the claimant, and particularly, the extent to which the action has interfered with dis-

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3. The Supreme Courts of Arkansas, Maine, Michigan and North Carolina initially rejected and then approved IOLTA programs.

tinct investment-backed expectations, leads to the inevitable conclusion that IOLTA programs do not take the client's property. Indeed, where the claimant's property is not otherwise impacted, loss of future profits will not support a taking claim. Andrus v. Allard, 444 U.S. 51 (1979). Or as Justice Peckham put it, if a claimant is "not injured to the extent of a penny . . . his abstract rights are unimportant." Hooker v. Burr, 194 U.S. 415, 419 (1904).

Because established taking doctrine requires at least some loss, and because petitioner can point to no loss from the operation of Florida's IOLTA program, her claim is not well-founded and does not merit review by this Court.

B. The IOLTA Premise. In upholding Florida's IOLTA program, the Court of Appeals, like the 37 state supreme courts

which have approved similar programs, recognized that IOLTA combines lawyer trust account mandates, economic realities, and banking law restrictions, to produce net income where, previously, there was no net income.

IOLTA is simplicity itself. Attorneys routinely receive funds in trust for future transactions. If the funds are large in amount or expected to be held for a long time, the attorney customarily deposits the funds in an interest-bearing account for the benefit of the client. IOLTA does not change this time-honored practice.

Often, however, lawyers hold clients' money in amounts which are very small or expected to be held for a very short period of time, making it impracticable and uneconomical to invest the

money productively for the client.[4] As a result, no interest is earned on these pooled accounts. Only the lawyer's financial institution benefits. Under IOLTA, all the inherently unproductive client deposits are pooled in an interest-bearing NOW account. The clients lose nothing. The interest earned only because of IOLTA is used to support law-related public services.

A few brief examples of the essentially nonproductive funds one would expect to find in an attorney's trust ac-

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4. The wide range of costs that lawyers incur include (1) the time to determine whether investment is warranted, (2) the time to obtain tax identification information, (3) the time to open a separate, income producing account, (4) law firm bookkeeping on a periodic basis, (5) preparation on tax reporting forms, and (6) the time required to close a separate, income producing account. A.B.A. Task Force and Advisory Board on Interest on Lawyer Trust Accounts, Report to the Board of Governors, 22-24 (July 1982).

count will demonstrate why no client is injured, not even to the extent of a penny.

1. **Cost Deposits.** A client involved in litigation is often required to provide costs in advance. In entrusting funds to the lawyer for the payment of costs, the client has no expectation of having the funds returned (although excess advances will be returned) nor any expectation of earning interest. The fact pattern sub judice is typical. Mrs. Glaeser gave her attorneys a $100 cost deposit. At the time of receipt, the small size of the deposit, as well as the expectation that the funds would be promptly disbursed, did not justify an effort to invest the funds. After disbursement, the small amount left over, $13.75, also did not justify investment. Indeed, as a practical matter,

$13.75 is inherently incapable of being put to productive use for an individual. The approximately 6¢ per month in earnings, at NOW account rates, would not offset bank service charges, let alone the costs incurred by attorneys to administer a separate interest-bearing account.

2. **Real Estate Escrows.** An attorney, representing the seller of a small piece of property, receives $500 to be held in escrow. At closing, some thirty to sixty days later, the deposit is applied to the sales price. If closing does not take place, depending on the sales contract and other factors, either the buyer or seller may be entitled to the deposit. The interest on the deposit, $2.19 per month, would not justify the expense required to negotiate provisions relating to the payment of interest or to set up a separate NOW account.

3. **Personal Injury Settlements.** Settlements come from insurance companies in the form of checks or drafts. Banks customarily indicate a time period in which it is safe to assume that the insurance company has "accepted" the draft or the check has cleared, but in fact the credit to the lawyer's trust account may occur sooner. In addition, there are a number of circumstances under which monies from the check or draft may stay in the account for days after disbursements are made. For example, assume $50,000 is received by an attorney on a Monday. The lawyer's trust account check is mailed to the client that day. It is received and deposited by the client on Wednesday. It clears the lawyer's bank on Friday. Everything has proceeded expeditiously, more expeditiously than likely. Does the client have any expectation of receiving

interest on the settlement amount during the four day "float" period? Clearly not. Yet, if the attorney's trust account were an IOLTA NOW account, some $28.76 would have been earned.

4. **Real Estate Closings.** In many instances, real estate closings are done in law offices. The attorney may receive the funds by wire a day in advance, thereby producing a one day accrual of interest. Or, the closing may be unexpectedly delayed for a day or two to clear last minute problems. As with personal injury settlements, disbursement checks will not clear instantly. The short term float will produce interest that cannot be apportioned in any rational way. Before IOLTA, only banks benefited from the float. Now, the public shares in the benefit.

C. Lack of a Substantial Constitutional Question. The fundamental flaw in petitioner's argument is her refusal to recognize that the $13.75 trust deposit did not produce, and was inherently incapable of producing, any net income which would ever accrue to her benefit. Mrs. Glaeser's claim to the 6¢ per month interest income totally ignores the cost of producing that income. On a quarterly payment basis, for example, the income produced would not even pay the cost of the postage necessary to mail her the interest earned, let alone all the other costs.

Both the District Court and the Court of Appeals fully understood the absence of net income-producing ability on the part of a $13.75 deposit when they rejected petitioner's claim, premised on Himely v. Rose, 9 U.S. (5 Cranch) 313,

319 (1809) that "interest goes with the principle, as the fruit with the tree," by noting that the "illustration necessarily assumed the existence of a fruit-bearing tree." Cone v. State Bar of Florida, 819 F.2d 1002, 1004 (11th Cir. 1987).

If customary trust rules are applied to attorney trust accounts, a client has no claim to interest earned in situations where the interest earned does not exceed the administrative costs incurred. IOLTA operates on that very real state of facts. Absent at least some real loss, no caselaw from this or any other court, turns a regulatory scheme into a taking. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) is not to the contrary. It certainly does not preclude the IOLTA's proponent's calculus that recognizes the real cost of pro-

ducing net income. Before IOLTA only banks benefited from the use of inherently unproductive client trust funds. Now, the justice system and the public benefits. If IOLTA is a taking, only banks, not the public and certainly not clients, will again benefit.

No substantial constitutional questions have emerged in any state with an IOLTA program. The rationale utilized by the Court below, as well as the reasons offered in support of IOLTA programs by the seven states with reported opinions, are fully consistent with this Court's taking jurisprudence.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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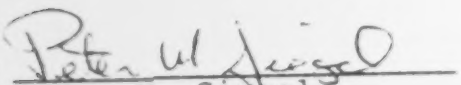
By 
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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that, in accordance with Rule 28.3, I have served three copies of the annexed Brief in Opposition to the Granting of a Writ of Certiorari on the attorneys of record by placing a copy in the United States mail,

first class mail, postage prepaid, addressed as follows:

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All parties required to be served have been served. Done this 21 day of September, 1987.

Peter M. Siegel, Esq.